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No. 370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto (App. 3). It is reported at 233 F. 2d 660. There was no opinion in the District Court. The order of the District Court denying defendant's motion to strike that part of the complaint

which alleged violations of the Safety Appliance Act (App. 14), and the memorandum filed by the District Court on rehearing of defendant's motion (App. 14-15) are also printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956 (App. 13). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The provisions requiring the use of specific safety appliances on railroad equipment are contained in sections 1-7 of the Safety Appliance Act, 45 U.S.C. § 1 *et seq.* Section 6 of the Act provides in part:

> ". . . That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars, . . . or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."[1]

In view of this express exemption, is the Safety Appliance Act applicable to four-wheel railroad motor track cars and push trucks?

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[1] The words "nothing in sections 1-7 of this title" were substituted in the codification of § 6. As enacted by Congress, 27 Stat. 532, March 2, 1893, and in its only subsequent amendment, 29 Stat. 85, April 1, 1896, this language read: "nothing in this Act contained shall apply to trains composed of four-wheel cars . . ."

STATUTES INVOLVED

The full text of Section 6 and Sections 1, 8, 11 and 23 of the Safety Appliance Act, the sections referred to in respondent's complaint, is printed on the Appendix to this petition.

Of critical importance is the following quoted part of § 6 of the Act, 45 U.S.C. § 6:

> "*Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

STATEMENT

This case presents the single important question whether or not the Safety Appliance Act applies to the four-wheel motor track cars and push trucks. There are more than 60,000 motor track cars and many more push trucks in use on American railroads today. None of these vehicles is equipped with air brakes, automatic couplers, standard draw bars, approved sill steps, ladders, whistles, bells and other devices required by the Safety Appliance Act. It is physically impossible to equip motor track cars and push trucks with all of these devices. So equipped, they would be too heavy to be removed from the tracks by a few men and, hence, would be unusable. However, if the Act applies, they are required to carry all these devices, most of which are not even remotely appropriate to their use.

During the sixty-three years the Safety Appliance Act has been in effect, the Interstate Commerce Commission, the agency charged with enforcement of the Act, has never applied the Act to vehicles of the type involved here. The Court of Appeals decision in this case holding the Act applicable, is in direct conflict with the long-established and uniform Interstate Commerce Commission interpretation and with the holding of another circuit. It is an unwarranted and unprecedented extension of the Act which will profoundly affect federal administration of the statute itself as well as the operations of the entire railroad industry.

The facts of the case are simple. Respondent, a section foreman of 46 years experience, was operating a motor track car along the westbound tracks of petitioner at Washington Grove, Maryland, on the afternoon of November 1, 1951. The day was misty and a light rain was falling which made the tracks wet and slippery (R. 26).[2] The motor track car was towing a push truck and carrying a load of tools and two men in addition to respondent (R. 24-25). As it was passing through Washington Grove Station, a dog suddenly dashed in front of the motor track car. The car struck the dog and was derailed (R. 27), injuring respondent.

The Vehicles Involved

A motor track car with men aboard and a push truck attached is illustrated in the Appendix to this petition (App. 17). As the photograph shows, this car

[2] Nine copies of the Joint Appendix before the Court of Appeals have been submitted to this Court with the Petition. References to the Joint Appendix are designated "R." and references to the Appendix to this petition, "App.".

is a lightweight, four-wheel vehicle, powered by a small gasoline motor. It is the successor to the familiar hand car of an earlier day. It travels along the tracks on wheels driven by a belt from the motor, in a manner similar to the operation of a power lawn mower. Riders sit on a bench running the length of the car with their feet on running boards. Tools and other equipment can be carried beneath the bench. The driver sits on the left rear side of the car and controls it by operating two levers which extend above the center of the bench. The car is braked by simple mechanical brakes which the driver applies by pulling back on the lever, thereby causing a brake shoe to be forced against each of the four wheels.

The record shows that there are approximately 60,000 motor track cars currently in use on American railroads, all substantially similar to the car involved here (R. 78). None is equipped with devices required on locomotives by the Safety Appliance Act. Motor track cars must be light enough to be lifted from the tracks by not more than three men after arriving at their place of work on the road bed in order not to interfere with the passage of regular trains (R. 42).

The push truck involved in this case is also a standard item of railroad equipment, and there are thousands of these trucks in use today. The push truck consists simply of a flat wooden platform mounted on four flanged wheels. It may be pushed or pulled along the track by hand or by a motor car. Push trucks do not have brakes. They neither move nor stop by their own power (R. 78). Respondent himself testified that he had never seen a push truck with brakes (R. 41).

The motor track car involved in this case was assigned to the respondent and he was not supposed to use it unless its brakes were in good condition (R. 39). Respondent testified that prior to using the car on the day of the accident he tested the brakes and they were in good condition (R. 43). In addition, he testified that the brakes worked properly at the time of the accident and locked the wheels when he pulled back on the brake lever (R. 55). Accordingly, the condition of the brakes was not an issue in this case.

Administration of the Safety Appliance Act

The Interstate Commerce Commission has been designated by law to administer the Safety Appliance Act (R. 85). Violations of the Act are prosecuted by the Department of Justice upon information furnished by the Commission (R. 85). The Commission has never construed the Act as applicable motor track cars and push trucks (R. 90-91). At the trial it was stipulated by counsel that the Department of Justice had never prosecuted a violation of the Safety Appliance Act which involved either motor track cars or push trucks (R. 73).

In addition, the record contains a copy of an Order of the Interstate Commerce Commission, in effect on the date of the accident, which states that motor track cars are not to be considered "locomotives" within the meaning of the Act. (R. 83). In the words of the Order:

> "A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive. . ."

Witnesses from the Commission testified that although this agency was charged with the enforcement

of the Act, the Commission did not inspect, issue any regulations, or take any action with respect to railroad motor track cars or push trucks (R. 81, 87, 88, 89, 90, 91); that the Locomotive Inspection Service which is required to inspect all locomotives at regular intervals took no cognizance of motor track cars (R. 80, 81); and the Commission's Safety Appliance Standards Order, establishing specifications for the equipment required by the Act or deemed necessary by the Commission, did not apply to motor track cars and push trucks (R. 87, 88).

Proceedings in the District Court

Respondent brought an action under the Federal Employers' Liability Act in the United States District Court for the District of Columbia. He alleged two causes of action:

The first, sounding in negligence, claimed that the railroad was negligent in furnishing him with a motor track car and push truck "without sufficient braking power" and requiring the motor car to pull the push truck over wet and slippery rails when the push truck was not equipped with brakes.

The second, alleging violation of the Safety Appliance Act, claimed that because there were no air brakes on the motor track car and no brakes of any kind on the truck, petitioner had violated those provisions of the Safety Appliance Act which required air brakes on "locomotives" and brakes on all cars subject to the Act.[3]

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[3] Speaking generally, in an action under the Federal Employers' Liability Act, violation of the Safety Appliance Act is, in effect, negligence *per se* and if such "negligence" is a proximate cause of the employee's injury, the railroad is liable under the Federal Employers' Liability Act. *Jacobson* v. *New York, N. H. & H. R. Co.*, 206 F. 2d 153.

Petitioner's motion to strike that part of the complaint which alleged violations of the Safety Appliance Act was denied by the District Court (App. 14). On re-hearing of this motion, the court stated that it was "not at all insensible to the practical argument advanced for the non-inclusion of the type of vehicle involved here under the Safty Appliance Act," but since there was "authority of respectable character which supports the position already taken," that the exemption applied only to logging cars, the court held the Act applicable. Since the court thought that Section 6 of the Safety Appliance Act was "unambiguous," reference to the legislative history was precluded (App. 14-15).

After trial in the District Court and an instruction that the Safety Appliance Act applied, respondent recovered a judgment for $15,000. This judgment was reviewed on appeal.

Opinion of the Court of Appeals

The appellate court plainly did not agree that Section 6 was unambiguous on the question whether the types of vehicles involved here were exempt from the Act. Its opinion relies almost entirely on its own interpretation of the legislative history of that section. It rejected alike the Commission's interpretation that all four-wheel cars are exempt and the opinion of the Court of Appeals for the Second Circuit in *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F. 2d, 227, cert. denied 294 U.S. 715, that the exemption applied only to "logging cars." In an entirely original approach, it held that the four-wheel car exemption was restricted solely to "coal cars" which are nowhere mentione in the Act. On that basis, it affirmed the judgment of the District Court.

This view of the Court of Appeals is without precedent in any known case. The plain wording of Section 6, which exempts *all* four-wheel vehicles from the Safety Appliance Act, was avoided by the following curious reasoning: If, said the Court, all four-wheel vehicles were exempt, a railroad could run entire trains of unbraked push trucks behind motor track cars and disregard the fact that unbraked vehicles increase train stopping distances, thus exposing employees to increased hazards. Since the Court deemed such a practice to be at variance with the policy of the legislation as a whole, it ignored the plain language exempting all four-wheel cars. Thus, by reference to a purely theoretical practice—unsupported by the record and unknown in actual operations—the present anomalous result was reached.

The opinion is in direct conflict with the opinion of the Court of Appeals for the Second Circuit in the *Hoffman* case, *supra*. It negates the long-established administration of the Act by the Interstate Commerce Commission and the Department of Justice. It presents grave and serious problems in the administration of the Act, since, as matters now stand, neither the Interstate Commerce Commission, nor the railroad industry can know which of these conflicting interpretations of the Act should be followed.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is in Direct and Irreconcilable Conflict With the Decision of the Court of Appeals for the Second Circuit in Hoffman v. New York, New Haven and Hartford R. Co., 74 F. 2d 227, cert. denied 294 U. S. 715

The decision of the court below on the interpretation to be given to Section 6 of the Safety Appliance Act cannot possibly be reconciled with the decision of the Second Circuit in *Hoffman* v. *New York, N.H. & H.R. Co.* While the net results in these two cases are not disparate, the conflict on this important question of federal law is direct. It is precisely the type of conflict which this Court recognizes under its Rule 19(1)(b) pursuant to its purpose "to secure the national rights and uniformity of Judgmts."[4]

The *Hoffman* case concerned an accident arising out of the towing of a hand car by a "gasoline tractor." The court affirmed a recovery based on a violation of the Safety Appliance Act after determining that the tractor was a "locomotive" because it "was frequently used to haul a long line of cars [standard railway cars], and there was as much reason for its being equipped to control their movements, as though it had been a steam locomotive employed for a similar purpose." 74 F. 2d, at 232. It might be added that the court additionally found "proof of defective brakes, a coupling device that was a mere dangerous makeshift, [and] an excessive rate of speed in moving the defectively equipped car." *Ibid.* The significance of

[4] Address of the late Chief Justice Vinson before the American Bar Association, September 7, 1949, quoting from Statement of John Rutledge of South Carolina during debates before the Constitutional Convention.

the *Hoffman* case, however, is that the argument was made there that the equipment involved was exempted from the Act by Section 6. The court rejected this contention relying *entirely* on its conclusion that: "The *exceptions* in section 6 are *expressly limited to 'logging' trains.*" *Ibid.* [Italics added.]

In the case at bar the Court of Appeals for the District of Columbia Circuit recognized this holding but characterized it as "not helpful" because the Second Circuit had "merely stated, without elaboration or explanation, that the exceptions in § 6 are limited to logging trains." 233 F. 2d, at 662. But the court went on to state:

> "Although we do not believe the four wheel car exemption in § 6 *can* be interpreted to apply solely to logging cars*, we do feel the legislative history demonstrates that Congress intended the four-wheel car exemption to be *restricted to coal cars.*" 233 F. 2d, at 662. [Italics added.]

In the *Hoffman* case, as here, only four-wheel cars were involved. Since both circuits were concerned only wth the four-wheel car exception, it follows that the holdings of the Second Circuit in *Hoffman* and the District of Columbia Circuit in *Jackson* are mutually exclusive and in direct conflict. If the four-wheel car exemption is "expressly limited to 'logging'

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* At this point the court cited *United States* v. *St. Louis-San Francisco Ry.*, No. 5522, United States District Court for the Eastern Division of Missouri, May 11, 1922, (unreported). The opinion in this case, which includes an extensive discusson of the legislative history of the original § 6 and its amendment, is reprinted at pages 8-13 of the Record. It directly supports the position of petitioner that the 1893 Act exempted *all* four wheel cars and the 1896 amendment merely enlarged the exemption to include eight-wheel logging cars.

trains," *Hoffman, supra,* it cannot be "restricted to coal cars," *Jackson, supra.*

It is also clear that this direct conflict on a critical provision of the Safety Appliance Act is of the gravest consequence. The Interstate Commerce Commission which must enforce the Act, the thousands of workmen who use the vehicles involved, the railroads that maintain them, and the courts determining cases arising out of accidents resulting from their use, must await alike the authoritative determination of this Court.[5]

II.

The Decision Below Overturns Sixty-Three Years of Consistent Administration of the Act by the Interstate Commerce Commission Despite Refusal of Congress to Alter the Commission's Interpretation in Repeated Amendments and Additions to the Act

The Safety Appliance Act was enacted on March 2, 1893, 27 Stat. 531. Section 6 of the Act was amended to its present form on April 1, 1896, 29 Stat. 85. In addition to providing for exemptions from the Act, Section 6 provides that it shall be the duty of the United States Attorneys to bring suits for violation of the Act on information furnished by the Interstate Commerce Commission, 45 U.S.C. § 6.

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[5] It could be argued, perhaps that the present case conflicts with a dictum of this Court in *Spokane & I.E.R. Co.* v. *United States,* 241 U.S. 344, 350, which referred to § 6 as "the provision excepting cars used on logging railroads". The better view, however, would seem to be to recognize this as a dictum included in a case which concerned the street railway exemption, of § 8, 45 U.S.C. § 8. As such, while it casts doubt on the interpretation of the court below, it does not bear directly the critical issue presented in this case.

The Interstate Commerce Commission has, by law, administered the Safety Appliance Act since its inception. This administration is accomplished through the Bureau of Safety and Service of the Commission. Throughout the 63 years of its administration of the Act the Commission has never ruled that motor track cars and push trucks were subject to the Act and the Bureau has taken no cognizance of these vehicles.

On March 11, 1913, the Commission published its Safety Appliance Standards Order which specifies the number, the dimensions and the location of safety appliances required by the Act. This order was reprinted in 1946.[6] It is still in effect today, and it was in effect on the date of the accident. Nowhere in this Order are motor track cars or push trucks mentioned and the Commission has never prescribed standards for these vehicles.[7]

The decision of the Court of Appeals in this case was premised on its holding that the motor track car was a "locomotive" because it was used to pull the

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[6] 49 C.F.R. §§ 131-136.

[7] It is not surprising that these small four-wheel vehicles are not included in the Commission's Order since they are not considered "cars" as that term is usually used to refer to standard rolling stock. There is no description of motor track cars in the Locomotive Cyclopedia, 13th Ed., 1947, and neither motor track cars nor push trucks are described in the exhaustive Car Builder's Cyclopedia, 18th Ed., 1949-51. Authorities, railroads and manufacturers have been unanimous in agreement that Safety Appliance Act devices are not required on the vehicles. This case is entirely different from the problem faced by this Court in *Shields* v. *Atlantic Coast Line*, 350 U.S. 318, where dome running boards were actually provided as standard equipment on tank cars although their specifications had not been standardized by order of the Commission.

push truck. Thus to designate as a "locomotive" a small vehicle that never has been and never could be used to haul standard railroad cars is a strained and unrealistic interpretation, as a glance at a picture of the vehicle itself will show (App. 17). It is likewise an interpretation without precedent in the annals of administration of the Safety Appliance Act.

Not only has the Commission never considered motor track cars to be locomotives, but it has declared by express Order that motor track cars are not to be considered "locomotives." The Commission Order of December 14, 1925,[8] provided for the inspection and testing of locomotives propelled by other-than-steam power. This Order was in effect from the date of issuance through the date of the accident. It states in pertinent part (R. 83):

> "A locomotive is a self-propelled unit of equipment designed *solely* for moving other equipment.
>
> "A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive. . . ." [Italics added.]

This Court has traditionally respected such a "practical construction" by the Commission, *Davis* v. *Manry*, 266 U.S. 401, and it has recognized that "nothing is more convincing in interpretation of a doubtful or ambiguous statute" than such uniform practice of the responsible administrative agency, *Wisconsin* v.

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[8] In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other-Than-Steam Power in Accordance with the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924. The Order is reprinted in the Record beginning at p. 81.

Illinois, 278 U.S. 367, 413. In *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740, the administrative construction was not upheld only because this Court found the Statute to be unambiguous. While petitioner here believes that Section 6 clearly exempts *all* four-wheel cars, it must, in fairness, acknowledge that there is a bewildering conflict of opinion in the Federal Courts as to the meaning of this section.

It is significant that nowhere in the Safety Appliance Act or in its legislative history are motor track cars or push trucks mentioned. Yet such equipment, so vital to the maintenance of safe tracks, was in general use almost from the beginning of railroad history and was certainly well known at the time the Act was passed. Congress is clearly aware of the fact that the Commission does not consider the Safety Appliance Act applicable to motor track cars and push trucks, and there has been no attempt by Congress to change this construction in repeated amendments and additions to the Act since 1893. See Acts of March 2, 1903, 32 Stat. 943; May 30, 1908, 35 Stat. 476; April 14, 1910, 36 Stat. 298; June 25, 1948, 62 Stat. 909.

To extend by judicial fiat the jurisdiction of the Commission into an area which—presumably with the approval of the Congress—it had previously not regulated is to multiply the responsibilities of the Commission and create serious new problems of administration and enforcement. Of even greater significance is the fact that boundaries of this new jurisdiction are nowhere defined. They are indicated only by the irreconcilable holdings of the Courts of Appeals in two circuits. Is the Act to apply to all four-wheel cars except coal cars? Is it to apply to all four-wheel cars except those used in logging? Is the Commission to

administer the law by one standard in one circuit and an entirely different and directly conflicting standard in another? Is the Commission to ignore the significance of this decision, or expand its facilities for testing and inspection to a point where they are commensurate with the new responsibility indicated? These are problems that can be solved only by an authoritative pronouncement of this Court.

This Court has properly reviewed cases where a decision was at war with established administrative interpretation. Typical is *Patterson* v. *Lamb,* 329 U.S. 539, where the holding below "upset twenty-five years of important War Department rulings and practices" which would affect thousands of claims. Id., at 541. The same considerations apply with greater force here.

III.

The Court Below Has Decided a Question of Federal Law of Enormous Practical Importance Which Has Not Been, But Should Be, Settled by This Court

There are in active daily use on American railroads more than 60,000 motor track cars and push trucks. These vehicles are necessary for track maintenance work. They are absolutely essential to the railroad industry. If the decision below is accepted literally, every single one of these vehicles will be ruled off the tracks, since none is equipped with appliances required under the Safety Appliance Act. Nor can they be so equipped.

The far-reaching effect of the Court of Appeals decision is appreciated only when this is recognized. The record shows—and it cannot be disputed—that the light weight of these vehicles is essential to their function. They are frequently operated on isolated

sections of track, miles away from the nearest switch. If they cannot be lifted and removed from the track by a few men they are useless. To encumber them with power brakes, automatic couplers, grab irons, standard draw bars, approved sill steps and ladders; in addition, to require the motor track cars to be equipped with headlight, whistle, bell, sander, signal equipment, compressors, and other Safety Appliance Act devices, is manifestly impossible. If it could be done, the motor track car and push truck could no longer serve the essential purpose for which they were designed.

The importance of this question of federal law can scarcely be overstated. The many four-wheel railway maintenance vehicles involved are in constant daily use in every judicial circuit and every state in the Union. They represent an investment of millions of dollars to the railroad industry. The crucial importance of the Safety Appliance Act to any action brought under the Federal Employers' Liability Act means a constant recurrence of the problem presented in this case. Until this Court speaks, the parties, the Commission, and the lower Federal Courts must remain in the welter of confusion induced by the conflicting views already on record.

CONCLUSION

The decision below presents three of the strongest possible reasons for review by this Court.

1. It is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Second Circuit in *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F. 2d 227, cert. denied 294 U.S. 715.

2. It overturns sixty-three years of uniform administration of the Safety Appliance Act by the Interstate Commerce Commission and presents grave problems to the Commission's enforcement of the Act.

3. It has decided a question of federal law of enormous practical importance that has not been, but should be, decided by this Court.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Text of Statutes Involved

45 U.S.C. § 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. 27 Stat. 531.

45 U.S.C. § 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper United States attorneys information of any such violations as may come to its knowledge: *Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

45 U.S.C. § 8. The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways. 32 Stat. 943.

45 U.S.C. § 11. It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. 36 Stat. 298.

45 U.S.C. § 23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said

locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. 36 Stat. 913; 38 Stat. 1192; 43 Stat. 659.

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT

v.

DANIEL T. JACKSON, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 7, 1956

Mr. Laidler B. Mackall, with whom *Mr. George B. Mickum, III,* was on the brief, for appellant.

Mr. Milford J. Meyer, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of Court, with whom *Mr. Irving L. Chasen* was on the brief, for appellee. *Mr. Irving A. Levine* also entered an appearance for appellee.

Before PRETTYMAN, DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* A jury verdict was rendered in favor of appellee in an action under the Federal Employers' Liability Act[1] for damages for personal injuries sustained in the course of his employment with The Baltimore and Ohio Railroad Company.

Appellee was injured in the derailment of a four-wheel motor track car which was then towing a four-wheel push truck along railroad tracks. The push truck weighed about 800 pounds empty and with the tools it was then carrying weighed about 1,200 pounds. There was no brake or motive power on the push truck. The motor track car was slightly heavier than the empty push truck and was equipped with a hand brake. While passing through a railroad station, the car struck a large dog; the impact derailed the car and appellee was thrown into a ditch and injured.

Appellee brought suit against the railroad under the Federal Employers' Liability Act, *supra*, alleging two causes of action. The first cause of action was based on the negligence of appellant in directing appellee to operate a motor track car and push truck without sufficient braking power, and in requiring appellee to pull the push truck over wet, slippery rails when the truck was not equipped with brakes. The second cause of action alleged that appellee's injuries were proximately caused by appellant's violations of the Safety Appliance Act[2] and the Boiler Inspection Act[3]—specifically, in that (a) the motor car was not equipped with a power driving-wheel brake (air brake), (b) the push truck was not equipped with any brakes, and (c) appellant had directed appellee to operate a car and truck without sufficient braking power.

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[1] 35 STAT. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

[2] 27 STAT. 531 (1893), 32 STAT. 943 (1903), 36 STAT. 298 (1910), 45 U.S.C. §§ 1-16 (1952).

[3] 36 STAT. 913 (1911), 38 STAT. 1192 (1915), 43 STAT. 659 (1924), 45 U.S.C. § 23 (1952).

The court below ruled and charged the jury that the provisions of the Safety Appliance Act were applicable to the vehicles in question. The issues on both causes of action were submitted to the jury, which found in favor of the appellee on "the issues aforesaid." This appeal is directed only to that part of the judgment which was based on the second cause of action.[4] Appellant contends: (1) the vehicles in question were not subject to the Safety Appliance Act and (2) appellee did not make a sufficient showing to go to the jury on the issue of whether the absence of the appliances allegedly required by the Safety Appliance Act was a proximate cause of the accident.

With respect to the first issue, appellant argues that the vehicles in question are exempt from the requirements of the Safety Appliance Act because of the proviso of § 6:[5]

> *Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Both vehicles involved *were* four-wheel cars, one powered and braked, one with neither power nor brakes.

Appellee contends the exemption in § 6 refers only to *logging cars,* and in support of this argument cites the decisions in *Spokane & Inland Empire R.R.* v. *United*

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[4] Since the jury's determination does not reveal whether they found for plaintiff on both or simply one cause, error found on this appeal would call for a new trial, without any appeal as to the first cause of action.

[5] 27 STAT. 532 (1893), 29 STAT. 85 (1896), 62 STAT. 909 (1948), 45 U.S.C. § 6 (1952).

States, 241 U.S. 344 (1916); *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F.2d 227 (2d Cir. 1934), cert. denied, 294 U.S. 715 (1935); *Martin* v. *Johnston*, 79 So.2d 419, cert. denied, 350 U.S. 835 (1955). Appellant, however, correctly points to the fact that the statute as originally enacted simply said "*Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains." 27 STAT. 532 (1893). The legislative history (discussed *infra*) shows that this provision was directed in its enactment specifically to exempt *coal cars*. 24 CONG. REC. 1477 (1893). Subsequently, in 1896, the proviso was amended to include "eight-wheel standard logging cars." 29 STAT. 85 (1896). The legislative history indicates that the proviso was amended because standard logging cars were only eight-wheeled. H.R.REP. No. 727, 54th Cong., 1st Sess. (1896).

The cases cited by appellee on this point are not helpful. In *Hoffman* v. *New York, N.H. & H.R. Co., supra*, the court merely stated, without elaboration or explanation, that the exceptions in § 6 are limited to logging trains. In *Spokane & Inland Empire R.R.* v. *United States, supra*, the Supreme Court referred to the § 6 exemption, again without discussion, as if it covered only logging trains.[6] In *Martin* v. *Johnston, supra*, the court made no reference whatsoever to the applicability of § 6.

Although we do not believe the four-wheel car exemption in § 6 can be interpreted to apply solely to logging cars,[7] we do feel the legislative history demonstrates that Congress intended the four-wheel car exemption to be restricted to coal cars. The four-wheel car exemption was enacted in 1893 as part of the original Safety Appliance Act. The exemption was offered as an amendment

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[6] This case was concerned only with the street railway train exemption of § 8, 32 STAT. 943 (1903), 45 U.S.C. § 8 (1952).

[7] United States v. St. Louis-San Francisco Ry., No. 5522, District Court for the Eastern Division of Mo., May 11, 1922 (unreported).

to the original bill (H.R. 9350). The Senator offering the amendment stated:

MR. BLODGETT. I desire to offer an amendment. At the end of section 6 of the bill as reprinted I move to add the following proviso:

Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

The PRESIDING OFFICER. The question is on agreeing to the amendment proposed by the Senator from New Jersey [MR. BLODGETT] to the amendment of the committee.

MR. BLODGETT. Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used, because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that peculiar work. A hook arrangement and link are used with considerable lost motion between the cars.

It is necessary to use that appliance, as I said, in order to go around the sharp curves. *I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic, and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.*

MR. CULLOM. I have had some conversation with the Senator from New Jersey in reference to his amendment, and he being much more familiar with the general subject of running the four-wheel cars than I, I am inclined to think perhaps his amendment is correct. I shall make no opposition to it myself. I have no objection to its adoption.

MR. STOCKBRIDGE. Let the amendment be read.

The Secretary read Mr. BLODGETT's amendment to the amendment of the committee.

MR. STOCKBRIDGE. That is all right.

The amendment to the amendment was agreed to. [Italics supplied.] (24 CONG. REC. 1477 (1893).)

We do not believe we can ignore such a clear and compelling statement as to the intent of the proviso.[8] To hold otherwise would require us to say that a railroad could run entire trains of four-wheel maintenance and supply cars drawn by a powered tractor, also having four wheels, and disregard the admitted fact (J.A. 69-70) that unbraked vehicles behind the powered tractor extend the distance required to stop the train, thus exposing employees to substantially increased hazards.

Our conclusion is further reinforced by the fact that if the four-wheel car exemption is interpreted to cover all four-wheel cars, this means a four-wheel motor track car like the one appellee was driving need not even be

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[8] As the Supreme Court said in United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940), "Frequently, however, even when the plain meaning [of a statute] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

equipped with hand brakes as required by § 11[9] of the act, even though that car might be driven along a slippery railroad track at 20 m.p.h. We do not believe Congress intended such a result when it provided in § 11 that "all cars must be equipped with . . . efficient hand brakes." 36 STAT. 298 (1910), 45 U.S.C. § 11 (1952). The long-established command to interpret this act liberally to accomplish its declared objective, the safety of persons and trains,[10] no doubt guided the trial court, and we think correctly so.

We are aware that when the logging-car exemption was added in 1896 the House Report[11] stated, in referring to the original four-wheel exemption:

> In the original act of March 2, 1893, there is a provision at the end of section 6 which exempts trains composed of four-wheeled cars from the operations of the act. This was evidently intended to apply to logging trains, but it happens that the cars are of eight wheels and do not come within the exception.

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[9] Although the § 6 exemption is not referred to in § 11 of the act, § 16 provides:

> § 16. Application of provisions to common carriers and vehicles subject to "Safety Appliance Acts."
>
> The provisions of sections 11-16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1-10 of this title. (36 STAT. 298 (1910), 45 U.S.C. § 16 (1952).)

Since a four-wheel car is exempt from §§ 1-10 of the act, it would seem to be exempt from § 11.

[10] Lilly v. Grand Trunk Western R.R., 317 U.S. 481, 486 (1943); Brady v. Terminal R.R. Ass'n, 303 U.S. 10, 15 (1938); New York Central R.R. v. United States, 265 U.S. 41, 44-45 (1924).

[11] H.R.REP. No. 727, 54th Cong., 1st Sess. (1896).

Obviously, the draftsman of this 1896 report failed to read the 1893 legislative history for there is no support for the House Report's conclusion and we must view the statement in the 1896 House Report as one Congress' erroneous *post* legislative view of the intent of a prior Congress.

Appellant also argues that the motor track car in question is not covered by the act's § 1[12] requirement for air brakes and a train brake system (brakes on all cars which can be controlled from locomotive) because the car is not used to haul *standard railroad cars* and is, therefore, not a locomotive.

We find nothing in the authorities cited by appellant which leads to a conclusion that a vehicle is a "locomotive" only if it is actually used to haul standard railroad cars. In *United States* v. *Fort Worth & Denver City Ry. Co.*, 21 F.Supp. 916 (N.D. Tex. 1937), the court held that a locomotive crane which was used to haul three other cars was a locomotive within the meaning of § 1 of the Safety Appliance Act. The court stated at p. 918:

> . . . In other words, while the equipment is being used as a crane, and moved about at the scene of construction, it is still a crane and does not become a locomotive, but where, as here, it is used to haul cars for a distance up to two and one-half miles from a switch to the scene of construction, it is being used for the purposes for which a locomotive is used and is a locomotive within the meaning of the statute. While the equipment is being used as

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[12] This section provides in pertinent part:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . . (27 STAT. 531 (1893), 45 U.S.C. § 1 (1952).)

a locomotive, it is a locomotive, regardless of whatever else it might also be.

The court in *Hoffman* v. *New York, N.H. & H.R.Co., supra,* held that a gasoline tractor which was hauling a hand car was a locomotive within the meaning of 45 U.S.C. §§ 1, 2.[13]

The I.C.C. order of December 14, 1925,[14] providing

> A locomotive is a self-propelled unit of equipment designed solely for moving other equipment.
>
> A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive.

is a classification which cannot control the courts in this situation. That definition is for purposes other than those we must deal with here. Since the motor track car in the instant case was being used to move other equipment, the I.C.C. order does not preclude a conclusion, on the facts of this case, that the car was then a locomotive even though it was not designed *solely* for moving other equipment.

In the present case the motor track car was being used to haul another car, i.e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name.

Appellant's second contention is that appellee failed to carry the burden of proving that the absence of the type of brakes allegedly required by the Safety Appliance Act was a proximate cause of the accident.

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[13] We do not believe the court based its decision solely on the fact that the "gasoline engine was frequently used to haul a long line of cars" (74 F. 2d at 232).

[14] In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other Than Steam Power in Accordance With the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924.

Appellee testified that if he had been driving the motor car alone without the truck, he could have stopped in about six to eight feet. Mr. Chrissinger, the Railroad's brake expert, testified that if the existing brakes lock[15] the wheels, the efficiency of the brakes would not be increased by increasing the brake power. Since this testimony was uncontradicted, it is suggested that air brakes would not have helped in any way to prevent the accident. However, this expert, on cross-examination, conceded that any unbraked portion of equipment behind the motored unit adds to the stopping distance of the entire train. Thus, the jury might reasonably find from the testimony that although air brakes on the motor car would not have been more efficient than the present brakes, the train, consisting of the motor car and push truck, would have stopped sooner if the push truck had been equipped with brakes controlled from the motor car (a train brake system)—i.e., that appellee either could have stopped before hitting the dog or could have slowed down sufficiently so that the impact would not have derailed the car.[16]

Affirmed.

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[15] Appellee had testified that the brakes did lock the wheels of the motor car.

[16] It is sufficient under the Federal Employers' Liability Act that the injury result *in part* from defendant's negligence. 35 STAT. 65 (1908), 45 U.S.C. § 51 (1952); Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956); Coray v. Southern Pacific Co., 335 U.S. 520, 524 (1949).

Judgment Below

Filed June 7, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Appellant*,

v.

DANIEL T. JACKSON, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Before: PRETTYMAN, DANAHER and BURGER, *Circuit Judges*.

JUDGMENT AND DECREE

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal and have execution therefor.

Dated: June 7, 1956.

Per Circuit Judge Burger.

District Court Order

Filed Mar. 10, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Defendant*

ORDER

Upon consideration of defendant's motion to strike so much of plaintiff's complaint which alleges violations of the Safety Appliance Act, 27 STAT. 531 (1893) as amended, and upon consideration of briefs and memoranda of law submitted by plaintiff and defendant, it is hereby

ORDERED, ADJUDGED AND DECREED this 10th day of March, 1955, that defendant's Motion to Strike is hereby denied.

MATTHEW F. McGUIRE
Judge

District Court Memorandum

Filed May 10, 1955

MEMORANDUM TO THE CLERK

The Court adheres to its original position. It is not at all insensible to the practical argument advanced for the non-inclusion of the type of vehicle involved here under the Safety Appliance Act.[1]

[1] 27 Stat. 531-2 (1892) as amended, 29 Stat. 85 (1896).

The fact is, however, that there is authority of respectable character which supports the position already taken.[2] The Court in the Hoffman case took the view that the statute was unambiguous. This is sound and accordingly resort cannot be had to extrinsic aids to construction. Nor does the fact, if it is a fact and it appears to be such, that the Interstate Commerce Commission has never since the passage of this statute some sixty years ago taken any steps to regulate vehicles of the character here involved inhibit this view, because the rule is that where there is no ambiguity, executive construction cannot change the plain language of a statute. (District of Columbia v. Pearson, (1921), 50 App. D.C. 303, 271 Fed. 377; Kansas City Southern R. Co. v. U.S. (1919), 252 U.S. 147. Federal Trade Comm. v. Bunte Bros., Inc., 312 U.S. 349, 352 is dictum and not helpful.)

MATTHEW F. McGUIRE
Matthew F. McGuire
United States District Judge

5/10/55

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[2] Hoffman v. New York, N.H. & H.R. Co., 74 F. 2d 227, 232 (2d Cir. 1934); Spokane & Inland Empire Railroad Company v. United States, 241 U.S. 344, 350.

Defendant's Exhibit 13

Motor track car with push truck attached.